SUPREME COURT OF THE UNITED STATES

RICHARD AUSTIN GREENE,)
Petitioner,)
V) CASE NO. 76-6617
RAYMOND D. MASSEY,)
Superintendent, Union Correctional Institution,)
Respondent.)
)

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

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OTHER AUTHORITY

OPINIONS BELOW

The opinion of the Florida Supreme Court which reversed Petitioner's conviction was rendered on November 5, 1968. See Sosa and Greene v State, 215 So. 2d 736 (Fla. 1968). The opinion which denied a writ of prohibition was rendered on April 17, 1970. See Sosa and Greene v Maxwell, 234 So. 2d 690 (2DCA Fla. 1970). The opinion which again considered Petitioner's second conviction after his retrial was rendered on October 25, 1974. See Greene and Sosa v State, 302 So. 2d 202 (4DCA Fla. 1974). The unreported opinion of a denial of habeas corpus relief was rendered on February 24, 1976. The opinion of the Fifth Circuit Court of Appeals affirming a denial of habeas relief was rendered on January 26, 1977. See Greene v Massey, 546 F. 2d 51 (5th Cir. 1977).

JURISDICTION

Petitioner in his jurisdictional statement seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. Section 1254 (1). In Petitioner's case, the opinion of the Fifth Circuit Court of Appeals, Greene v Massey, 546 F 2d 51 (5th Cir. 1977), was rendered on January 26, 1977. No Petition for Rehearing appears to have been filed by either party. Petitioner's Petition for Writ of Certiorari was filed in this Court on or about April 22, 1977. Said Petition is untimely and does not invoke this Court's jurisdiction. See 28 U.S.C., Section 2101 (c); Rule 22 (3), Rules of the Supreme Court. Petitioner has neither alleged nor requested an extension of time for the filing of his Petition. See Rule 22 (4), Rules of the Supreme Court; 28 U.S.C. Section 2101 (c). This Court is without jurisdiction to consider this Petition for Writ of Certiorari. See United States v Adams, 383 U.S. 39, 86 S. Ct. 708, 15 L Ed 2d 572 (1966); Carter v United States, ___U.S.___, 75 S.Ct. 911, 100 L Ed 1508 (1955). More than 30 days has elapsed from the date of the opinion by the Fifth Circuit Court of Appeal and the filing of this Petition. Rule 22; Carter, supra.

QUESTIONS PRESENTED

I

WHERE THE STATE HAS PROVIDED A DEFENDANT WITH AN OPPORTUNITY FOR FULL AND FAIR CONSIDERATION OF A FIFTH AMENDMENT CLAIM, IS FEDERAL HABEAS CORPUS PRECLUDED?

II

WHETHER THERE EXISTS REAL AND EMBARRASSING CONFLICT IN THE LOWER COURT'S DETERMINATION OR THE EXISTENCE OF ISSUES OF GREAT PUBLIC IMPORTANCE?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

No person shall "be subject for the same offense to be twice put in jeopardy of life or limb..."

AMENDMENT XIV

Section 1. * * * (N)or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Section 2254. State Custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Florida Appellate Rule 6.16 (b)

"Upon an appeal by the defendant from the judgment the appellate court shall review the evidence to determine if it is insufficient to support the judgment where this is a ground of appeal. Upon an appeal from the judgment by a defendant who has been sentenced to death the appellate court shall review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not."

STATEMENT OF THE CASE

Petitioner and Sosa were tried and found guilty of murder in the first degree in November, 1965, and sentenced to death. An appeal was taken to the Florida Supreme Court in Sosa and Greene v State, 215 So. 2d 736 (Fla. 1968). On appeal, the Florida Supreme Court in a four to three decision reversed the judgments of conviction of the defendants and remanded the case for a new trial. In its opinion the Supreme Court stated:

> "PER CURIAM.
>
> After a careful review of the voluminous evidence here we are of the view that the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree, and that the interests of justice require a new trial. The judgments are accordingly reversed and remanded for a new trial.
>
> It is so ordered."
> Id., at 737.

After remanding the case for a new trial, Petitioner and Sosa filed a suggestion for a writ of prohibition against the trial court alleging that retrying the defendants again for murder in the first degree would be a violation of double jeopardy. The trial court denied the motion, and the defendants appealed the decision to the Second District Court of Appeal in Sosa and Greene v Maxwell, 234 So. 2d 690 (2DCA 1970). In Sosa and Greene, supra, the suggestion was denied

and the case was remanded for a new trial on the charge of murder in the first degree. Defendants appealed to the United States Supreme Court and certiorari was denied. Sosa and Greene v Maxwell, 402 U.S. 951, 91 S.Ct. 1617, 29 L Ed 2d 121 (1971).

Petitioner and Sosa were retired in January, 1972, convicted of murder in the first degree, and sentenced to life imprisonment. An appeal was taken to the Fourth District Court of Appeal in Greene and Sosa v State, 302 So. 2d 202 (4DCA Fla. 1974), which held that the doctrine of res judicata was dispositive of the case. An appeal was again taken to the United States Supreme Court, where certiorari was again denied. Green and Sosa v State of Florida, 421 U.S. 932, 95 S.Ct. 1660, 44 L Ed 2d 89 (1975).

Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court, Middle District, Orlando Division, on May 14, 1975, alleging that he was illegally restrained. A hearing was held on February 19, 1976 in United States District Court, where relief was denied. Petitioner appealed to the Fifth Circuit Court of Appeals in Greene v Massey, 546 F 2d 51 (5th Cir. 1977), where denial of relief was affirmed. The instant Petition followed.

ARGUMENTS AGAINST GRANTING CERTIORARI

I

WHERE THE STATE HAS PROVIDED A DEFENDANT WITH AN OPPORTUNITY FOR FULL AND FAIR CONSIDERATION OF A FIFTH AMENDMENT CLAIM, FEDERAL HABEAS CORPUS REVIEW SHOULD BE PRECLUDED.

Federal habeas corpus review is precluded where a State has provided a defendant with an opportunity for full and fair litigation of a Fourth Amendment claim. In the landmark case of Stone v Powell and Wolff v Rice, ___U.S.___, 96 S.Ct. 3037 (1976), this Court decided by a six to three majority that where the state has provided a defendant with an opportunity for full and fair litigation of a Fourth Amendment claim,a state prisonermay not be granted habeas corpus relief on the ground that evidence obtained through an unconstitutional search and seizure was introduced at his trial.

Implicit in its holding in Stone, is that a federal court must give finality to criminal convictions and that the states are competent forums for the adjudication of federal constitutional rights.

Petitioner in the case at bar received an opportunity for full and fair litigation of his Fifth Amendment claim in the state courts. In Sosa and Greene

v State, 215 So. 2d 736 (Fla. 1968), the Supreme Court in a four to three decision reversed the judgments of conviction and remanded the case for a new trial. Petitioner and his co-defendant filed a writ of prohibition in the trial court claiming that retrial of the defendants for first degree murder would constitute a violation of double jeopardy. The argument was rejected by the District Court of Appeal in Sosa and Greene v Maxwell, 234 So. 2d 690 (2DCA Fla. 1970):

> "The relators urge in this court that where an appellate court has reversed because of the insufficiency of the evidence it is tantamount of a finding of not guilty and to retry Sosa and Greene for murder in the first degree would constitute double jeopardy. We cannot agree with this conclusion under the facts of this case and we deny the writ of prohibition. The relators have not made a clear showing that the reversal by the Florida Supreme Court in this case was based on insufficiency of the evidence to establish an essential element or elements of the crimes charged. Rather, the reversal inthis case appears to be based on a finding that the evidence, though technically sufficient, is so tenuous as to prompt an appellate court to exercise its discretion and, in the interest of justice, grant a new trial." Id., at 691.

* * * * * * * * * *

> "Relators urge that the Fifth Amendment prohibition against double jeopardy is made applicable to the states through

> the Fourteenth Amendment as held in Benton v Maryland, 1969, 395 U.S. 784, 89 S.Ct. 2056, 23 L Ed 2d 707. We agree that the Federal standards used in applying the Fifth Amendment's bar against double jeopardy are applicable to the states...
>
> Moreover, the relators have cited and we have found, no cases interposing the prohibition against double jeopardy under the fact presented here. Indeed, some federal cases seem to allow a retrial after reversal even for fundamental insufficiency of evidence. Indeed, it would constitute an anomaly in law if an appellate court could not reverse and remand for a new trial if it was of the opinion that the evidence, while legally sufficient to support the jury's verdict was so far from convincing as to require a new trial in the interest of justice." Id., at 692.(Emphasis supplied).

From the opinion by the state appellate court in Sosa and Greene v Maxwell, supra, it is clear that by applying federal standards, the state court fully and fairly adjudicated Petitioner's double jeopardy claim and ruled adversely to Petitioner's position.

In a dissenting opinion, Mr. Justice Brennan acknowledged that this Court's majority opinion in Stone severely curtailed the role of federal habeas corpus review of state criminal convictions pursuant to 28 U.S.C. Section 2254:

> "I am therefore justified in apprehending that the groundwork is being laid today for a drastic withdrawal of federal habeas jurisdiction, if

> not for all grounds of alleged unconstitutional detention, then at least for claims--for example, of double jeopardy, entrapment, self-incrimination, Miranda violations, and use of invalid identification procedures--that this Court later decides are not 'guilty-related.'
>
> To the extent the Court is actually premising its holding on an interpretation of 28 U.S.C. §2243 or §2254, it is overruling the heretofore settled principle that federal habeas relief is available to redress any denial of asserted constitutional rights, whether or not denial of the right affected the truth or fairness of the fact finding process." Id.

Federal standards were applied to Petitioner in the case at bar. The state courts fully and fairly adjudicated Petitioner's double jeopardy claim. The Second District Court of Appeal considered Petitioner's claim and found it to be unmeritorious. The Fourth District Court of Appeal discussed the Fifth Amendment claim, but refused to consider the double jeopardy claim. See Greene v State, 302 So. 2d 202 (4DCA Fla. 1974). In all situations, the state courts were repeatedly presented with Petitioner's double jeopardy claim.

The Fifth Circuit Court of Appeals in Greene v Massey, 546 F 2d 51 (5th Cir. 1977), discussed the State's contention as to the applicability of Stone to Fifth Amendment claims and indicated:

> "Florida also contended in its supplemental brief and during oral argument that the Stone v Powell principle governing habeas collateral relief enunciated in

> the Fourth Amendment exclusionary rule context extends to this case where Petitioner has had repeated consideration of his double jeopardy claim by state courts.
>
> * * * * * * * * * *
>
> In light of the limited scope of Stone v Powell, it is not applicable to this appeal where the only question is a legal one--does double jeopardy apply to his case? Furthermore, it is a specifically proclaimed 'personal constitutional right.'" Id., at fn 6.

It should be noted that this Court has expressed an interest in recent decisions that federal habeas corpus review should be further restricted on claims other than alleged Fourth Amendment violations where the Stone principle is briefed and argued in the lower court and this Court. In Castaneda v Partida, ___U.S.___, 45 U.S.L.W. 4302 (March 23, 1977), this Court reached the merits of a grand jury claim of discrimination, however, in various dissenting opinions by Mr. Justice Burger, Mr. Justice Powell, Mr. Justice Rehnquist, and Mr. Justice Stewart, four Justices on this Court suggested that the Stone "opportunity for full and fair litigation" principle may be applicable to claims other than alleged Fourth Amendment violations. See Castaneda, supra, 45 U.S.L.W. at 4309, fn 1. Additionally, this Court in Swain v Pressley, ___U.S.___, 45 U.S.L.W. 4281 (March 22, 1977), held that a District of Columbia parallel post conviction remedy could be

substituted for federal habeas, and that a substitution of a new collateral remedy which is neither inadequate nor ineffective does not constitute a suspension of the writ.

In a concurring opinion by Mr. Chief Justice Burger, Mr. Justice Blackmun, and Mr. Justice Rehnquist, this Court further indicated:

> "Dicta to the contrary in Fay v Noia, 372 U.S. 391 (1963), have since been shown to be based on an incorrect view of the historic functions of habeas corpus. Schneckloth v Bustamonte, 412 U.S. 218, 252-256 (1973) (Powell, J., concurring). The fact is that in defining the scope of federal collateral remedies the Court has invariably engaged in statutory interpretation, construing what Congress has actually provided, rather than what it constitutionally must provide. See Developments in the Law--Federal Habeas Corpus. 83 Harv. L. Rev. 1038, 1268 (1970). Judge Friendly has expressed this view clearly:
>
> > 'It can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did.' Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgment, 38 U.Chi.L.Rev. 142, 170 (1970) (footnote omitted).
>
> Since I do not believe that the Suspension Clause requires Congress to provide a federal remedy for collateral review of a conviction entered by a court of competent jurisdiction. I see no issue of constitutional dimension raised by the statute in question." Id., at ___U.S.___, 45 U.S.L.W. at 4284.

Double jeopardy claims are not"guilty related". Petitioner was found guilty of murder in the first degree by two separate juries on two separate occasions. The opinion by the Second District Court of Appeal in Sosa and Greene v Maxwell, supra, 234 So. 2d at 692 indicates that the Florida Supreme Court's reversal was not based on insufficiency of the evidence; the same opinion further indicates that fundamental insufficiency of the evidence was not argued on direct appeal [1] by Petitioner, but was brought up sua sponte by the Florida Supreme Court through its power from Florida Appellate Rule 6.16 (b). See Sosa and Greene v Maxwell,supra, 234 So. 2d at 691, fn. 1.

In light of Stone and subsequent cases decided by this Court, it seems clear that this Court is prepared to consider extending Stone to claims other than alleged Fourth Amendment violations.

1/ Because fundamental insufficiency of the evidence was not brought up on direct appeal, Francis v Henderson, 425 U.S. 536, 96 S.Ct. 1708, 48 L Ed 2d 149 (1976), and Estelle v Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L Ed 2d 126 (1976), may altogether preclude federal habeas review for failure to follow a state procedural rule. See also Wainwright v O'Berry, 546 F 2d 1204 (5th Cir. 1977).

II

PETITIONER HAS NOT ESTABLISHED THAT THIS COURT SHOULD ASSUME ITS DISCRETIONARY JURISDICTION OVER THE INSTANT CASE ON THE BASIS OF EITHER THE EXISTENCE OF A REAL AND EMBARRASSING CONFLICT OF AUTHORITIES INVOLVED IN THE LOWER COURT'S DETERMINATION OF THIS CAUSE OR THE EXISTENCE OF ISSUES OF GREAT PUBLIC IMPORTANCE BEYOND THAT OF THE IMMEDIATE LITIGANTS.

A

THE OPINION OF THE FIFTH CIRCUIT COURT OF APPEALS IS IN ACCORD WITH PRIOR OPINIONS OF THIS COURT.

Pursuant to 28 U.S.C. Section 2106 an appellate court may reverse a judgment of conviction and remand the cause for a new trial. The section provides that:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." (Emphasis supplied).

The leading case construing the power of federal appellate courts to reverse a judgment of conviction pursuant to 28 U.S.C. Section 2106 is Bryan v United States, 338 U.S. 552, 70 S.Ct. 317, 94 L Ed 335 (1950). In Bryan, the defendant was convicted of two counts of attempt to evade the income

tax laws. The defendant moved for a judgment of acquittal at the end of the government's case and all the evidence. Both motions were denied. After [illegible]lty verdict the defendant again moved for a judgment of acquittal, or in the alternative for a new trial, which were denied. The Court of Appeals reversed the judgment of conviction and remanded the case for a new trial, because it found the evidence adduced at trial insufficient to sustain the conviction. An appeal was taken to the United States Supreme Court by the defendant claiming that a judgment of acquittal should have been entered at trial.

In rejecting the defendant's argument that requiring him to again stand trial would constitute a violation of the principles of double jeopardy, the Court held that when an accused successfully appeals his conviction the fifth amendment does not bar retrial. In addition, this Court announced that once a defendant appealed a conviction an appellate court became vested with broad discretion pursuant to 28 U.S.C. Section 2106 in determining what was an appropriate judgment under the circumstances.

By a comparable state statute, the Florida Supreme Court has review power at least equal to that possessed by this Court under 28 U.S.C. Section 2106. Florida Appellate Rule 6.16 (b) grants the Florida Supreme Court power to review the sufficiency of the evidence to determine if it is insufficient to support the judgment and if the "interests

of justice" require a new trial. In Tibbs v State of Florida, 337 So. 2d 788 (Fla.1976), the Florida Supreme Court cited as its authority to review convictions for which the death penalty has been imposed, Florida Appellate Rule 6.16 (b).

It is important to recognize that the power granted to the Florida Supreme Court by Florida Appellate Rule 6.16 (b), and federal appellate courts by 28 U.S.C. Section 2106, is not a mandatory practice. The statutes speak in terms of "such further proceedings ...as may be just under the circumstances," 28 U.S.C. Section 2106, and "the appellate court shall review the evidence to determine if the interests of justice require a new trial..." Florida Appellate Rule 6.16 (b).

The most important of the exceptions barring retrial is where a defendant waives the constitutional guarantee against double jeopardy by appealing a conviction.

In City of Charlotte v Firefighters, ___U.S.___, 49 L Ed 2d 732 (1976), this Court considered whether a two-tier court system violated the double jeopardy clause and indicated that the constitutional guarantee against double jeopardy imposes no limitations upon the power to retry a defendant who has succeeded in getting his first conviction set aside:

> "The decision to secure a new trial rests with the accused alone. A defendant who elects to be tried de novo in Massachusetts is in no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand of his case for a

> new trial. Under these circumstances, it long has been clear that the State may reprosecute. United States v Ball, 163 US 662, 41 L Ed 200, 16 S Ct 1192 (1896). The only difference between an appeal on the record and an appeal resulting automatically in a new trial is that a convicted defendant in Massachusetts may obtain a 'reversal' and a new trial without assignment of error in the proceedings at his first trial. Nothing in the Double Jeopardy Clause prohibits a State from affording a defendant two opportunities to avoid conviction and secure an acquittal." Id., at 49 L Ed 2d at 742.

In an analogous situation, where a defendant requests a mistrial due to the prosecution's error, in United States v Dinitz, ___U.S.___, 96 S.Ct. 1075, 47 L Ed 2d 267 (1976), defendant's main counsel was repeatedly cautioned by the trial judge about his opening argument. Persisting in his conduct, he was banished from the courtroom. The trial judge then requested his co-counsel, who was unprepared to go to trial, to proceed. The next day, co-counsel informed the court that the defendant wanted his main counsel to try the case. The trial judge set three alternatives that might be followed--a stay of the proceedings pending application to the court of appeals, continuation of the trial with defendant's co-counsel trying the case, or declaration of a mistrial. Co-counsel shortly moved for a mistrial.

The Supreme Court of the United States indicated that while the defendant was faced with a "Hobson's choice"

in moving for a mistrial, the defendant waived a defense of double jeopardy by moving for a mistrial:

> "...a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.... In such circumstances, the defendant generally does face a 'Hobson's choice' between giving up his first jury and continuing a trial tainted by prejudicial judicial or prosecutorial error. The important consideration for purpose of the Double Jeopardy Clause, is that the defendant retains primary control over the course to be followed in the event of such error." Id., ___U.S.___, 47 L Ed 2d at 274-275.

A defendant waive's a plea of double jeopardy by asking that his conviction be set aside. If a federal statute fails to run afoul of the double jeopardy clause, then a state rule, Florida Appellate Rule 6.16 (b), should be accorded similar consideration.

B

THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISION OF OTHER CIRCUIT COURTS OF APPEAL AND HAS NOT LED TO CONFLICTING APPLICATIONS OF THE PRINCIPLES OF DOUBLE JEOPARDY IN OTHER COURTS.

Two viewpoints have been enunciated by appellate courts in reference to whether a retrial violates the principles of double jeopardy. One line of cases from the Fifth Circuit Court of Appeals has repeatedly construed Bryan as permitting retrial for insufficiency of the evidence where the accused has waived the constitutional guarantee against double jeopardy by moving for a new trial. See United States v Carter, 516 F 2d 431 (5th Cir. 1975); United States v Peterson, 488 F 2d 645 (5th Cir. 1974); United States v Blake, 488 F 2d 101 (5th Cir. 1974); Apollo, 476 F 2d 156 (5th Cir. 1973); United States v Robinson, 4678 F 2d 189 (5th Cir. 1972); United States v Parks, 460 F 2d 736 (5th Cir. 1972); United States v Restano, 449 F 2d 485 (5th Cir. 1971); United States v Musquiz, 445 F 2d 963 (5th Cir. 1971).

In other circuits the decision to retry the defendant after a successful appeal depends upon whether the prosecution could supplement its case on retrial. But if the insufficiency of the evidence cannot be cured, on retrial, then an appellate court would be free to enter a judgment of acquittal or dismiss

the charge. See United States v Snider, 502 F 2d 645 (4th Cir. 1974); United States v Stapleton, 494 F 2d 1269 (9th Cir. 1974); United States v Koonce, 485 F 2d 374 (8th Cir. 1973); United States v Wiley, 478 F 2d 415 (8th Cir. 1973); United States v Howard,432 F 2d 1188 (9th Cir. 1970); United States v Fiore, 443 F 2d 112 (2nd Cir. 1971); United States v Edmons,432 F 2d 577 (2nd Cir. 1970); United States v Stroble, 431 F 2d 1273 (6th Cir. 1970); Phillips v United States,311 F 2d 204 (10th Cir. 1962).

In Forman v United States, 361 U.S. 416, 80 S.Ct. 481, 4 L Ed 2d 412(1960), this Court indicated:

> "Under 28 U.S.C. Section 2106, the Court of Appeals has full power to go beyond the particular relief sought...when (petitioner) opened up the case by appealing from his conviction, he subjected himself to the power of the appellate court to direct such 'appropriate' order as it thought just under the circumstances." Id., at 425-426.

While a growing number of courts have held that retrial after an appellate finding of insufficient evidence allows the appellate court to discharge a defendant, see United States v Wiley, 517 F 2d 1212 (D.C. Cir. 1975); State v Torres, 510 P 2d 737 (Ariz. 1973); Hervey v People, 495 P 2d 204 (Colo. 1972); People v Brown, 241 NE 2d 653 (Dist. App. Ill. 1968), the majority view as announced by this Court in Bryan, and the various federal appellate courts, allows an appellate court to remand the cause for a new trial.

The rule allowing retrial is not mandatory in all instances. Instead, an appellate court is granted the option of remanding for a new trial if the error may be cured, entering a judgment of conviction for a lesser included offense to meet the evidence, or discharging defendant. No violation of the principles of double jeopardy occurred upon a reversal for insufficient evidence. Nothing in the double jeopardy clause precludes a State from retrying a defendant who sucessfully obtains a reversal based upon insufficient evidence.

CONCLUSION

The Stone principle may be applicable to Fifth Amendment claims of double jeopardy where the issue was repeatedly considered by the state courts. When a defendant appeals a conviction, the double jeopardy clause does not bar retrial. This Court should not reach the merits of Petitioner's double jeopardy claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished, by mail, this 26th day of May, 1977, to Honorable John T. Chandler, Florida Legal Services, Inc., Prison Project, 2614 S.W. 34th Street, Gainesville, Florida 32608; and Honorable Donald C. Peters, Office of Clinics, Room 320, College of Law, University of Florida, Gainesville, Florida 32614, Attorneys for Petitioner.

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